U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY ARTHURS and DEPARTMENT OF JUSTICE, IMMIGRATION NATURALIZATION SERVICE, BORDER PATROL, Tampa, FL

Docket No. 98-681; Submitted on the Record;
Issued November 12, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim.

By decision dated February 29, 1996, the Office denied appellant's claim for hearing loss on the basis that the hearing testing performed by Dr. Thomas S. Herman, the Board-certified otolaryngologist, to whom the Office referred appellant for an evaluation of his hearing loss and its relation to his employment, were inconsistent and did not allow the Office to make a determination on appellant's hearing loss.[1] By decision dated August 26, 1996, the Office refused to modify this decision, finding that the additional audiogram appellant submitted with his request for reconsideration was not sufficient to support an award of compensation, as it showed inconsistent results and its reliability was rated poor.

By letter dated August 11, 1997, appellant again requested reconsideration, and submitted, in addition to copies of material already in the case record, the report of evoked potential testing done by Dr. Herman's audiologist on January 11, 1996 and two reports dated June 19, 1997 from Noreen P. Frans, a clinical audiologist. Ms. Frans addressed the evoked potential testing done by Dr. Herman's audiologist, noting that it utilized a 95 decibel stimulus:

> "The more appropriate protocol would include stimulus presentation at decreasing intensity levels in an effort to establish threshold estimation.
>
> "Since [this] was not the case, the interpretation would be considered speculative as to the degree of hearing loss at the frequency tested. But the noted wave morphology and latencies are not uncommon in persons with documented sloping sensorineural hearing loss."

[1] Although this Office decision stated that appellant had not established fact of injury, Dr. Herman indicated that appellant's hearing loss was due to noise exposure in his employment, but that the hearing test results were not valid or representative of appellant's hearing.

Ms. Frans also addressed the other testing done by Dr. Herman:

> "A review of behavioral audiometry testing performed during three sessions at Dr. Herman's office suggested fluctuant hearing acuity in both ears. Fair speech discrimination ability is consistent for all three evaluations. [Appellant's] degree and configuration of bilateral hearing loss is not atypical of patients experiencing noise-induced hearing loss. The classic high frequency notched configuration usually associated with the onset of this type of hearing loss may deteriorate to a more gradually sloping pattern when noise exposure persists."

By decision dated September 22, 1997, the Office found that the additional evidence was irrelevant and not sufficient to warrant review of its prior decisions.

The only Office decision before the Board on this appeal is the Office's September 22, 1997 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on August 26, 1996 and the filing of appellant's appeal on December 29, 1997, the Board lacks jurisdiction to review the merits of appellant's claim.[2]

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> '(1) end, decrease, or increase the compensation awarded; or
>
> '(2) award compensation previously refused or discontinued.'"

Under 20 C.F.R. §10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[3] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[4]

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim.

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[2] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

[3] *Eugene F. Butler*, 36 ECAB 393 (1984).

[4] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

The new evidence appellant submitted with his August 11, 1997 request for reconsideration is not relevant. The results of the evoked potential testing cannot be used to determine the extent of appellant's hearing loss, as noted by the reports of Ms. Frans, the audiologist. The reports from Ms. Frans do contain any reliable evidence on the extent of appellant's hearing loss, and thus are not relevant to the basis of the Office's denial of the claim. Instead these reports address the possible causal relation between appellant's hearing loss and his employment. As an audiologist is not a physician within the meaning of section 8101(2) of the Federal Employees' Compensation Act,[5] Ms. Frans' opinion on causal relation is not considered competent medical evidence.[6] As appellant has not submitted new and relevant evidence, the Office properly refused to reopen appellant's case for further review of the merits of his claim.

The decision of the Office of Workers' Compensation Programs dated September 22, 1997 is affirmed.

Dated, Washington, D.C.
November 12, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

[5] 5 U.S.C. § 8101(2).

[6] *Henry Frank*, 33 ECAB 261 (1981).